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Anthologizing the Administrative State

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Book Review

Peter H. Schuck, *Foundations of Administrative Law*. New York: Oxford University Press, 1994. Pp. viii + 385.

Reviewed by Harold J. Krent

Oxford's new administrative law anthology, edited by Peter Schuck of Yale, should benefit administrative law discourse for years to come. The anthology includes forty-two readings in one 385-page volume that students and professors can use both to complement their understanding of administrative law and to help formulate new ideas for research. The innovative articles excerpted in the anthology explore the theoretical underpinnings and pragmatic problems of the administrative process, from an investigation of cultural norms prevalent in particular bureaucratic structures to a study of agencies' reactions to remands from courts.

Schuck selected first-rate excerpts and divided the anthology into eight units. Before each unit he briefly introduces the readings to follow, and at the end of each he adds helpful comments and questions. The first unit addresses the theoretical foundations of the administrative state, and the second, its historical evolution. The third discusses the Administrative Procedure Act. The fourth unit focuses on the internal dynamics of agency practice, and the next examines models of procedural justice. The sixth unit is by far the largest, analyzing the efforts to control administrative discretion: by the courts, by Congress, by the President, by interest groups, through norms within the agency, and through public participation.¹ The seventh unit includes two short excerpts on comparative administrative law, and the anthology closes, appropriately enough, with pieces addressing the future of administrative law.

While many of the selections are well known, such as excerpts from Theodore J. Lowi's *The End of Liberalism*² and now-Justice Stephen G. Breyer's *Regulation and Its Reform*,³ I was pleasantly surprised to discover several provocative articles of which I had not been aware. For instance, the excerpt from Robert A. Kagan's "Adversarial Legalism and American Government"⁴ is intriguing, addressing the perils of excessive litigation in part through an analysis of the Port of Oakland's unsuccessful efforts in the mid-1980s to dredge its harbor.

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1. No excerpt, however, addresses the interaction between these very different control mechanisms or hypothesizes as to the optimal mix of oversight efforts.
2. 2d ed., New York, 1979.
3. Cambridge, Mass., 1982.
4. 10 J. Pol'y Analysis & Mgmt. 369 (1991).

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The script reads part comedy and part tragedy, which may typify many other examples of well-meaning administrative regulation gone awry.

To my knowledge, three other administrative law anthologies currently exist. Robert L. Rabin of Stanford compiled an anthology in the late 1970s,⁵ and no competitor surfaced for almost fifteen years. Within the last several years, Anderson Publishing Company has entered the anthology market, publishing a volume this year devoted to readings in administrative law.⁶ N.Y.U. has also published some essays on administrative law,⁷ though the readings are directed primarily to a British audience.⁸

The Oxford anthology has many strengths. One of its successes (like that of the Anderson anthology) is its focus on the presidency. Administrative actors respond not only to congressional overseers, private interest groups, and judicial oversight, but also to the influence of the executive. No study of administrative law can be complete without focusing on executive controls in general and, in particular, on the coordinating function of supervision by the Office of Management and Budget. Evolution of presidential controls under Executive Orders 12291⁹ and 12498¹⁰ and now, with President Clinton, 12866,¹¹ has been one of the most critical developments in administrative law over the past decade. Several excerpts cogently evaluate the significance and desirability of executive supervision of administrative agencies.

Another strength is the innovative decision to include comparative law issues, which only the N.Y.U. anthology also addresses. The two excerpts selected by Schuck provide a glimpse of the myriad arrangements that are possible in establishing bureaucratic structure. The excerpts remind us, for instance, that administrative tribunals need not be subject to overview by general courts; that liability systems can be structured much more favorably to the private party litigating against the government than is currently the case in this country; and, that administrative agencies can attain compliance with governmental objectives through conciliation and suasion as well as through more formal legal action such as penalties or injunctions.

5. *Perspectives on the Administrative Process* (Boston, 1979).

6. *Administrative Law Anthology*, ed. Thomas O. Sargentich (Cincinnati, 1994).

7. *Administrative Law*, ed. Denis Calligan (New York, 1992). The editor reprinted the selected articles in their entirety without any of his own commentary or questions.

8. The anthologies have much in common. All four, for instance, largely ignore state administrative practice for reasons of expediency and universality. (The Schuck anthology does contain one brief excerpt from Arthur Bonfield's work on state administrative practice.) All four readers address the legitimacy of agencies, and their historical evolution. In addition, each anthology explores the problems of hearing rights and the nature of due process under the administrative state. There is no question that the problems of structuring relations among the branches and of recognizing individual rights lie at the center of administrative law.

9. 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note (1988). Implementation of centralized control can be traced at least as far back as the Ford Administration. See 39 Fed. Reg. 1,1017 (1977).

10. 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601 note (1988).

11. 3 C.F.R. 638 (1994).

In addition, the excerpts in the Oxford anthology at least touch on other new developments in administrative law, such as negotiated rule-making (which the Anderson anthology also addresses). The readings refer to the increased emphasis on market-based regulatory alternatives such as emissions trading, but in a surprisingly desultory way. (They are not covered extensively in the Anderson anthology either.) There is little specific examination of the host of market-based mechanisms proposed and implemented in different agencies, except for some general discussion in the Breyer excerpt and in a very truncated excerpt from Ronald Cass's "Privatization: Politics, Law, and Theory."¹²

The principal strength of the anthology is, rather, its incorporation of insights gleaned from work in related fields, primarily political science, sociology, and economics. Administrative law, like public law generally, has begun to incorporate methodologies and analytics from other disciplines.¹³ In particular, excerpts in the Oxford anthology reflect sophisticated application of political theory. Selections from Robert Kagan, Charles E. Lindblom, James Q. Wilson, Jerry L. Mashaw, and Terry Moe bring political science and positive political theory insights to the study of the administrative process. Indeed, in comparison to the other anthologies (except the Rabin predecessor), a large number of the excerpts are from articles and books written by political scientists.

For example, one of the two excerpts from Wilson's *Bureaucracy*¹⁴ analyzes agency structure and internal management incentives by placing agencies along a continuum of production organizations, craft organizations, coping organizations, and procedural organizations. The excerpt from Lindblom attempts to explain agency incrementalism through an analysis of information scarcity: agencies fashion policy out of previously acquired information to obviate the need to amass and distill vast amounts of new information. Reliance upon that limited information consequently constrains policy choices.¹⁵ An excerpt from R. Shep Melnick castigates administrative law professors for teaching too little public administration and too much case law.¹⁶ One excerpt from Mashaw (a legal academic) summarizes attacks on the administrative process from both a critical legal studies and a positive political theory perspective.¹⁷ In short, the anthology packages a considerable amount of scholarship with which students are likely to be unfamiliar.

Despite the impressive breadth of the subjects canvassed, I remain ambivalent about the selections in the Oxford anthology. Given the wide array of scholarship pertaining to the administrative process, a consensus on what to

12. 71 Marq. L. Rev. 449 (1988).

13. See generally William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707 (1991).

14. New York, 1989.

15. *The Science of "Muddling Through"*, 19 Pub. Admin. Rev. 79 (1959).

16. *Administrative Law and Bureaucratic Reality*, 44 Admin. L. Rev. 245 (1992) ("Get Real, Administrative Law").

17. *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. Econ. & Org. 267 (1990).

include in an anthology is unlikely, and I, like every other professor or practitioner, have my own biases. Editors of all anthologies must prioritize goals: examining varied subject matters, introducing different analytical perspectives, and including as many fine examples of scholarship as possible, keeping in mind that the excerpts must be accessible to readers. Page limitations imposed by publishers steepen the challenge.

In focusing principally on political science perspectives, the Schuck anthology follows the path set by Rabin fifteen years previously. Both anthologies self-consciously eschew consideration of judicial doctrine. The rationale presented is that, because most administrative law casebooks focus so heavily on judicial decisions and on the problems that judicial oversight engenders, there is greater need in an anthology for examination of political and sociological perspectives.¹⁸ Editors have largely allocated the finite space in the anthologies to texts providing a political science or institutional vantage point on the administrative process that unquestionably is difficult to gain from reading most casebooks.

There is much to be said for that strategy, but I find it troubling. Institutional analysis is certainly vital, but not necessarily to the exclusion of other developments shaping the course of the administrative process, among them judicial doctrine and scientific evaluation of environmental or occupational risks. To coin a neologism, the Oxford reader's deliberate decision to stress political science is Elicentric in two senses. First, and less important, the reader is Elicentric in that selections from Yale professors are (inordinately?) represented in the mix. If one counts the political science department as well as the law school, roughly a quarter of the readings are by authors who have a Yale affiliation. Of course the fact that Yale pieces are showcased neither adds to nor detracts from their intrinsic worth and, as I mentioned, the articles are quite strong. Because the academics at Yale are interested in political theory, it should come as no surprise that the excerpts as well reflect that cast.

Nonetheless, the Oxford anthology also manifests Elicentricity in conforming to the reputed Yale prejudice against legal doctrine. Certainly, most administrative action does not concern courts, and an exclusive focus on

18. Schuck explains that "[w]hile judicial doctrine is important, administrative law course and casebooks are already so preoccupied with caselaw that there is little danger, and much opportunity, in a book of this kind largely ignoring doctrine in favor of a more institutional and contextual orientation. In this way, the student (especially the law student) can learn that agencies' behavior is shaped far less by the episodic decisions of reviewing courts than by institutional politics and other nonlegal phenomena such as agency culture, market forces, and professional norms" (6).

The thematic similarities between the two anthologies are clear. Indeed, each anthology includes excerpts from Wilson and an almost identical excerpt from Lindblom's article on the science of muddling through.

19. Moreover, as even Schuck notes, casebooks over the last fifteen years have increasingly included sophisticated discussion of political science perspectives, including public choice analysis (4). The leading casebooks at least cite, if not discuss, the majority of selections included in the anthology. To provide one example, the Gellhorn, Strauss casebook cites a majority of the selections in the Schuck anthology and includes significant excerpts from quite a few. Walter Gellhorn et al., *Administrative Law: Cases and Comments*, 8th ed. (Mineola, N.Y., 1987). My guess is that the other leading casebooks, published more recently, incorporate even more of the same material.

doctrine cannot do justice to the realities of the administrative process. Yet there have been considerable changes and challenges in administrative law doctrines which are not well covered in the casebooks,¹⁹ and from which a student can learn much. Doctrinal development, as well as shifts in judicial approach, affect much more than the relatively few administrative actions that ultimately are reviewed in court. Rather, they can influence, if not radically transform, relationships among the branches. Indeed, evolving understanding of the judicial role has also altered the procedures and priorities within agencies themselves.

One of the most fundamental changes in public law over the past ten years—glossed over in the Oxford anthology—has been the renewed attention to issues of statutory construction. The problem of interpretation vitally affects the administrative state as well as the relationship between the judiciary and the legislature. Given the skepticism now afforded legislative history,²⁰ officials in administrative agencies no longer can rely, as many did, on legislative history as an indicator of congressional intent, and thus may not follow its directives as closely.²¹ In other words, legislative history no longer shapes administrative action as it once did. Just as invalidation of the legislative veto²² forced members of Congress to take different steps to influence administrative action, so has diminished reliance on legislative history. Moreover, the emergence of theories of dynamic construction has considerable potential impact on the conduct of agency officials as well, freeing them from the narrow compromises underlying original enactment of legislation.²³ Although the Schuck anthology includes a brief excerpt from Cynthia R. Farina's article deploring the *Chevron* doctrine of judicial deference to agency interpretation of statutes,²⁴ there is scant mention of the perhaps broader changes wrought by new theories of statutory interpretation. (The Anderson anthology includes excerpts addressing statutory interpretation.)

Nor are significant doctrinal developments addressed, whether the

20. For secondary accounts, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295 (1990); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990).
21. Peter L. Strauss, *When the Judge Is Not the Primary Official with the Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 Chi.-Kent L. Rev. 321 (1990).
22. See *INS v. Chadha*, 462 U.S. 919 (1983).
23. See generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988).
24. *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989).
25. See, e.g., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989). The Schuck anthology cites but does not discuss the article (230).
26. See, e.g., Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653 (1992); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws"*, 64 Tex. L. Rev. 1 (1985).

nonacquiescence confrontation in the 1980s (discussed in the Anderson anthology)²⁵ or the continuing puzzle posed by equitable estoppel (not mentioned in Anderson).²⁶ Doctrine can be an effective vehicle for studying the premises underlying the administrative state. The nonacquiescence debate, for instance, strikes at the heart of what we mean by agency autonomy and how much we should value bureaucratic consistency. A case on equitable estoppel provides a glimpse into the byzantine and yet persisting rules of sovereign immunity, introducing the larger problems of structuring interactions between the citizen and the state and between agency personnel and their superiors.

There is certainly a place in anthologies for analysis of political and sociological theory, but that focus should not crowd out other valuable insights into administrative law. In addition to discussion of doctrine, an administrative law anthology might benefit from inclusion of case studies. Indeed, Schuck, along with his colleagues Jerry L. Mashaw and Bruce A. Ackerman, has done leading studies of agency practice: Schuck in immigration,²⁷ Mashaw in Social Security²⁸ and automobile safety,²⁹ and Ackerman in coal.³⁰ Mashaw's study of the automobile industry, written with David L. Harfst, has become a classic inquiry into the impact of judicial review on agency policy and procedural choices. Such studies may aid students in understanding the nuances of the administrative process far more than either excerpts from political theory or evaluation of judicial doctrine. But casebooks no more than refer in passing to such studies, depriving students of a sufficient feel for the polycentric challenges confronting agencies. The selections in Schuck's anthology and the editor's notes rely on such case studies (e.g., 153-54, 201-09), but the case studies themselves, with one exception (the Kagan article), are not excerpted. Kagan's brief account of the political fight over dredging Oakland Harbor illustrates the consequences of excessive litigation in a way that a pure piece on theory could never hope to accomplish.

Moreover, the Oxford anthology (like the Anderson anthology) does not directly address the problem of evaluating environmental or health risks.³¹

27. Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven, 1985); Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 *Stan. L. Rev.* 115 (1992).

28. *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, 1983).

29. *The Struggle for Auto Safety* (Cambridge, Mass., 1990).

30. Bruce A. Ackerman & William T. Hassler, *Clean Coal/Dirty Air* (New Haven, 1981). For an example of a recent administrative law book making effective use of case studies, see David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven, 1993) (using case study of citrus industry to make point of evils of congressional delegation).

31. For examples of work addressing such rules, see Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, Mass., 1993); W. Kip Viscusi, *Fatal Tradeoffs: Public and Private Responsibilities for Risk* (New York, 1992); Paul Slovic, *Perception of Risk*, 236 *Sci.* 280 (1987).

32. For a helpful discussion, see Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* ch. 3 (Cambridge, Mass., 1990).

From the casebooks alone, students are often left wondering how administrators should evaluate particular risks, and whether past regulatory efforts (as well as judicial review of those efforts) have had any beneficial impact.³² Although decisions about coverage are idiosyncratic, administrative law anthologies—space permitting—thus might benefit not only from inclusion of more case studies like Kagan's but also from studies assessing risks and the impact of prior regulatory efforts.

Given its acknowledged slant toward political theory, who would gain from using the Oxford anthology? Law teachers should obtain a copy, if they have not already; the book is a valuable resource, introducing or refreshing one's recollection of important scholarship as well as different perspectives on the administrative process. Similarly, students in advanced classes would profit from using the anthology to study the institutional structure underlying agency action.

I have misgivings, however, about recommending the anthology for use in the basic survey course. Some of the readings are of only tangential benefit in illuminating basic themes, even though many courses could well be improved by including more readings on public administration. In addition, several of the readings may be inaccessible to students without a good deal of clarification. That difficulty is compounded by the organization of each unit; loosely connected excerpts pose a challenge to effective pedagogy. For instance, Peter Schuck's article on the exceptions process and regulatory equity is grouped with an excerpt from Charles A. Reich's "The New Property"³³ and the Kagan article on Oakland Harbor. Connections exist, but demand considerable explanation.³⁴

Anthologies can be of considerable benefit to both professor and student. The editor performs an immense time-saving function in selecting what to publish and then collecting the choices in one convenient package. The Schuck anthology excels in part by exposing the administrative law student (or teacher) to a wide range of insights on public administration that might otherwise go unconsidered. But the sins of omission to some extent cancel the virtues of commission. The dominant focus on political science materials misses the opportunity to provide students with a fuller contextual analysis of the administrative process that neither the casebooks, nor political theory, can accomplish.

33. 73 Yale L.J. 733 (1964).

34. I have two final quibbles with the Schuck anthology. First, the anthology would benefit from an index to help students who use the anthology as a research tool. A student interested in studying the internal dynamics of agency policy making, for instance, would not immediately realize that articles placed in several different units address that topic. Second, I have no idea as to the publishing methods of Oxford University Press, but the company needs to find a way to minimize typographical errors.